

SEP 23 1976

MICHAEL ROBAL, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-235

E. ALVEY WRIGHT,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,

Petitioner,

—v.—

STOP H-3 ASSOCIATION, *et al.*,

Respondents.

**BRIEF IN OPPOSITION TO GRANTING
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

BOYCE R. BROWN, JR.
Suite 1100, Financial Plaza of the Pacific
Honolulu, Hawaii 96813

Of Counsel:
BROWN & BETTENCOURT *Attorney for Respondents*

September 1976

TABLE OF CONTENTS

	Page
Questions Presented	1
Introductory Statement	4
Maps	following page 4
Statement of the Case	5
A. Factual Background	5
1. Need for (T)H-3	5
2. Description of the Undertaking	6
3. Moanalua Valley	8
4. Moanalua Gardens Foundation	9
B. Secretary of Interior's Determination that Moanalua Valley is Eligible as an Historic Site of State/Local Importance	9
C. Proceedings Below	10
Reasons for Denying the Writ	11
A. The U. S. Secretary of Interior Properly Determined Moanalua Valley as "Eligible" for Inclusion on the National Register.	12

	Page
B. U. S. Secretary of Interior has Authority to Determine the Local, State, National Historical Significance of a Property Under NHPA.	16
C. The U. S. Secretary of Interior is an Appropriate Official to Determine a Property's State/Local Significance for Purposes of §4(f).	19
D. Section 4(f) Applies to the Petroglyph Rock, Pohaku ka Luahine.	24
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Citizens to Preserve Overton Park v. Volpe 401 U.S. 402 (1971)	7, 12, 22
Don't Tear it Down v. GSA 6 ELR 20091 (D.C.DC 1975)	14
EDF v. Brinegar 6 ERC 15177 (E.D. Pa. 1974)	22
Penn. Environmental Council, Inc. v. Bartlett 454 F.2d 613 (3rd Cir. 1971)	22, 25

	Page
Named Individual Members of San Antonio Soc. v. Texas, 446 F.2d 1013 (5th Cir. 1971)	22
Sierra Club v. Froehlke 5 ERC 1033 (S.D. Tex. 1973)	16
Tyrrell v. Dist. of Columbia 243 U.S. 1 (1917)	25
Warm Springs Task Force v. Gribble 417 U.S. 1301, 6 ERC 1745 (Douglas J. Circuit Judge) issuing stay pending appeal of 378 Supp 240, 6 ERC 737 (N.D. Cal.) Stay aff'd per curioni, _____ U.S.	15

Statutes:

16 U.S.C. §461, <i>et seq</i>	17
§463	10
§469 a-1	17
§470, <i>et seq</i>	2, 12, 16 17, 18
§470a(a)(1)	2, 14, 18
§470(b)	17, 21
§470(c)	17
§470d(b)	18
§470(f)	13

	Page
16 U.S.C. §470(i)	16
§470(k)	14
23 U.S.C. §109	11
§128	11
§134	11
§138	1, 11, 21
42 U.S.C. §4321	10, 17
§4331	21
49 U.S.C. 1653(f)	1, 11

Articles:

Gray, The Response of Federal Legislation to Historic Preservation, 36 Law and Contemp. Prob. 314 (1972)	24
Hugh J. Yarrington, Judicial Review of Sub- stantive Agency Deficiencies (1974).....	23

Miscellaneous:

23 C.F.R. §771.19	23, 24
-------------------------	--------

	Page
23 C.F.R. §771.19(a)	23
§771.19(b)	23
§771.19(c)	23
36 C.F.R. §800, <i>et seq</i>	13
§800.4(a)(2)	15, 18, 22
§800.5	13
§800.6	15
§800.10(b)	25
41 C.F.R. Part 1500, App. II	17

Federal Register:

39 Fed. Reg. 6402, <i>et seq.</i> (February 19, 1974)	16
41 Fed. Reg. 17689 (April 27, 1976)	15

Executive Order:

Executive Order 11593	2, 13, 14, 17, 18, 19
§1(3)	14, 15

	Page
Congressional Reports:	
House Report No. 1916, 89th Cong. 2d Sess. 7 (1966)	17
Senate Report No. 1363, 89th Cong. 2d Sess. 6 (1966)	18
114 Cong. Rec. 240 32 (July 29, 1968)	20

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976
No. 76-235

E. ALVEY WRIGHT,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,
Petitioner,

—v.—
STOP H-3 ASSOCIATION, *et al.,*

Respondents.

**BRIEF IN OPPOSITION TO GRANTING
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

QUESTIONS PRESENTED

Pursuant to 23 U.S.C. §138; 49 U.S.C. §1653(f):

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreational lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and

waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

1. Whether the U.S. Secretary of Interior acting pursuant to the authority vested in him under the National Historic Preservation Act, 16 U.S.C. §470a(a)(1), and Executive Order 11593, has "jurisdiction" within the meaning of §4(f) to make determinations of the local historic significance of privately-owned historic sites.

2. Whether the U.S. Secretary of Interior followed proper procedures under the National Historic Preservation Act, 16 U.S.C. §470, *et seq.*, in designating Moanalua Valley "eligible" for inclusion in the National Register of Historic Places as a site of state or local significance.

3. Whether the determination by the U.S. Secretary of Interior that a property is "eligible" for inclusion in the National Register of Historic Places is sufficient to trigger the protections of §4(f).

4. Whether a determination by the U.S. Secretary of Interior under authority of the National Historic Preservation Act, 16 U.S.C. §470(a)(1), and Executive Order 11593 that a property has historical significance can be reversed by the findings of a local review board.

5. Whether the petroglyph rock, Pohaku ka Luahine, a property listed on the National Register of Historic Places, is a site within the meaning of §4(f).

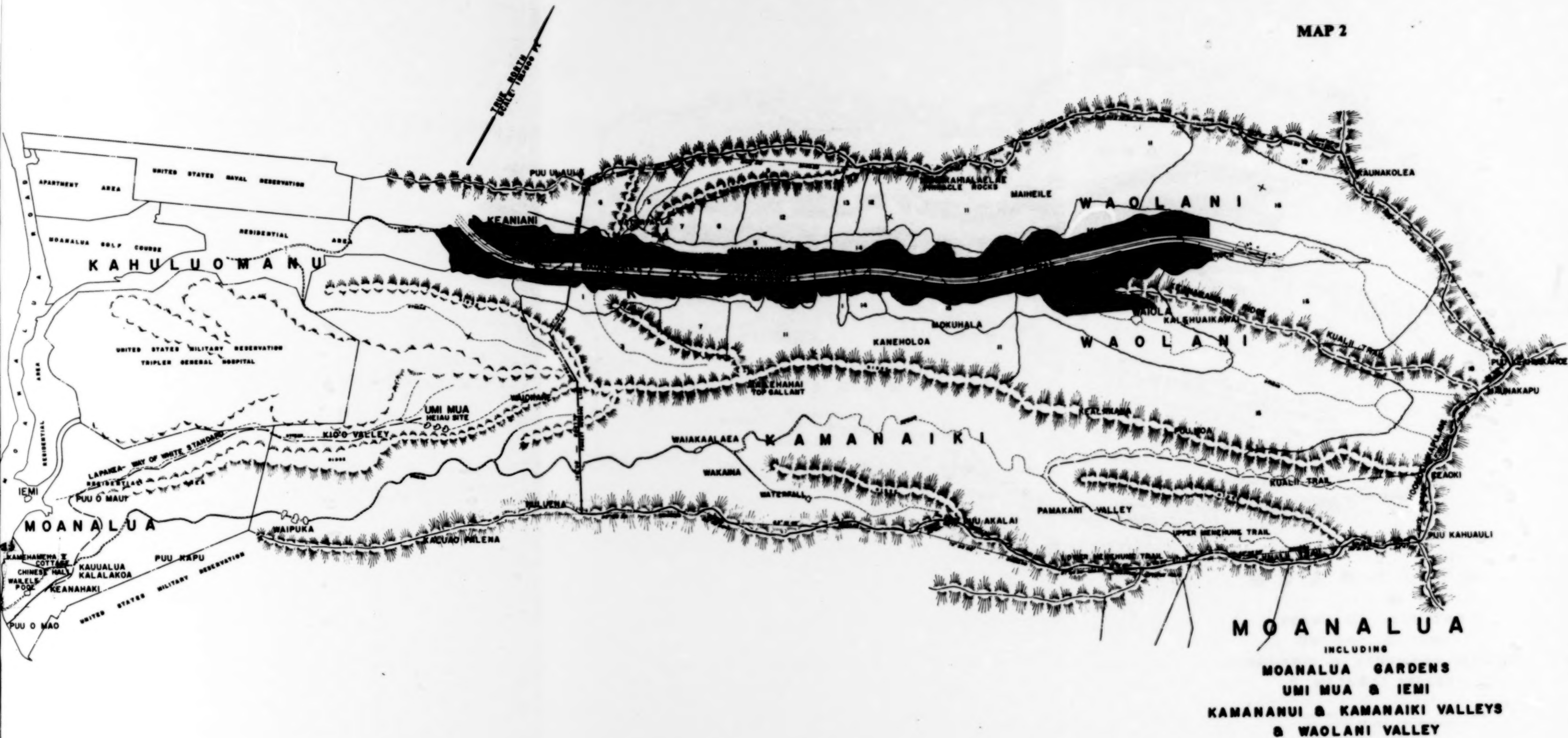
INTRODUCTORY STATEMENT

(T)H-3 represents far more than just another highway—it will create a changed Hawaiian style of life. To add to this dilemma, the highway as planned will run smack up the middle of Moanalua Valley, a site determined by the U.S. Secretary of Interior to be eligible for inclusion in the National Register of Historical Places. Even the President's Advisory Council on Historic Places considers the impact of (T)H-3 on the Valley *adverse*. Therefore, if historic preservation is to mean anything, these determinations must be honored by denial of the writ of certiorari.

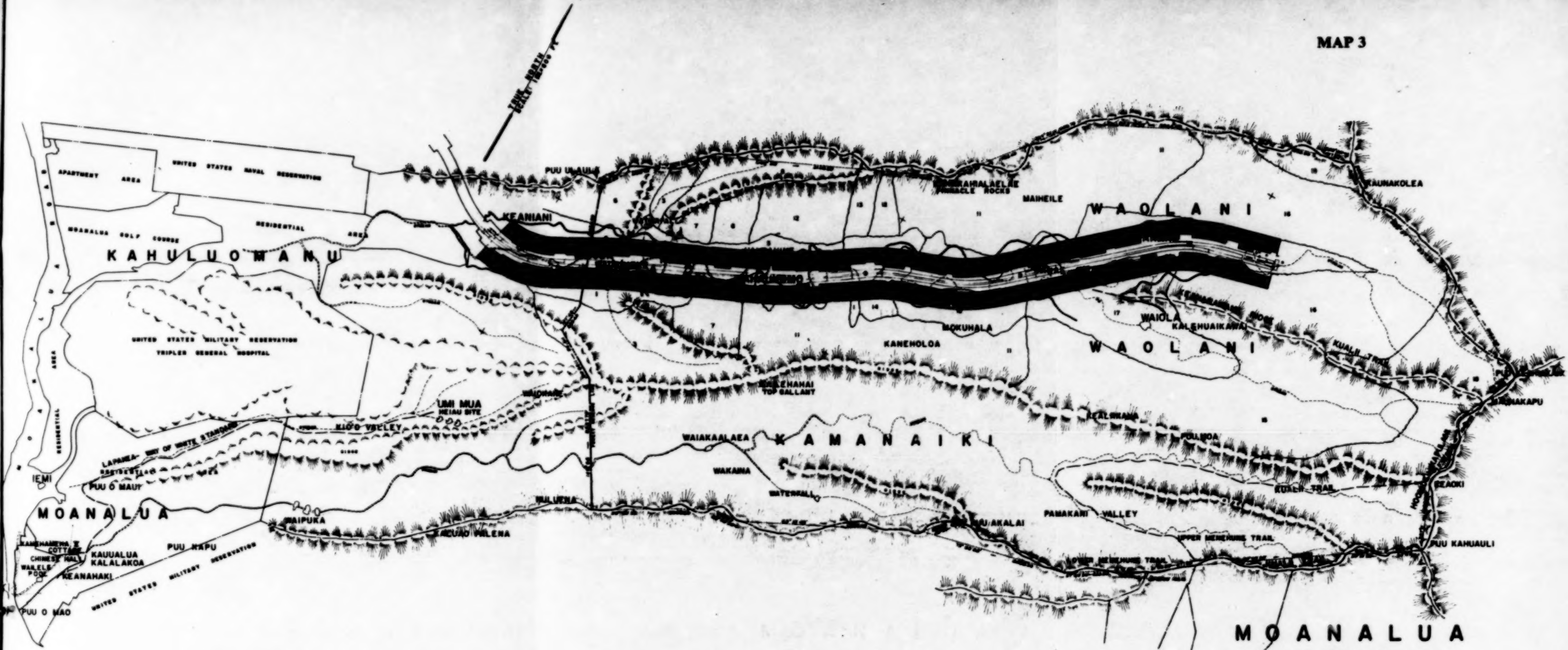
- MAP ONE: The Moanalua Valleys, showing historic and archeological sites and zones of native vegetation.
- MAP TWO: The Moanalua Valleys, showing the amount of parkland where the grade is 25% or less and the impact of (T)H-3 thereon.
- MAP THREE: The Moanalua Valleys, showing historic and archeological sites and zones of native vegetation, the parkland, and the noise zones of Great Impact and Some Impact (as defined in the E.I.S.) if the proposed (T)H-3 is constructed.

1946 NORTH
STATE - 1946

PREPARED BY:
MOANALUA GARDENS FOUNDATION
1322 Pineapple Place
Hoselands, Hawaii 96819
March, 1973 Updated July, 1975
Walter R Thompson, Inc. Engineers - Surveyors

MAP 2

PREPARED BY:
MOANALUA GARDENS FOUNDATION
1352 Pineapple Place
Honolulu, Hawaii 96819
March, 1973 Updated July, 1975
Walter R Thompson, Inc. Engineers - Surveyors



MOANALUA
INCLUDING
MOANALUA GARDENS
UMI MUA & IEMI
KAMANANUI & KAMANAIKI VALLEYS
& WAOLANI VALLEY

PREPARED BY:
MOANALUA GARDENS FOUNDATION
888 Paeopae Place
Honolulu, Hawaii 96819
March, 1973 Updated July, 1978
Walter R. Thompson, Inc. Engineers - Surveyors

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

1. *Need for (T)H-3*: The State justifies the building of (T)H-3 on an assumed need to transport 12,760 persons (peak hour, peak direction) from the eastern side of Oahu (referred to hereafter as Windward Oahu) across the Koolau Mountain range and into downtown Honolulu in the year 1990.¹ However, when evaluating the manner in which these 12,760 people are to be handled, it becomes apparent that the State is merely trying to "softsell" a highway rather than honestly examine the need for it.²

It's important to understand that the planned direction for Oahu's population growth is not the area to be served by (T)H-3 but rather the leeward plain which is in exactly the opposite direction (Western side of Island.). Because of the tremendous influence highways have on determining population growth, the construction of (T)H-3 will severely upset the City and County's planned area of development.

¹ Reference was also made in Petitioner's Brief that the building of (T)H-3 was consistent with the 1964 Oahu General Plan (OGP), considered the format for development for City and County of Honolulu. (*Pet. 8 n. 3*) This statement is false and should not have been overlooked by Petitioner as it was a Cause of Action in Plaintiffs' original Complaint. As brought out then, the 1964 OGP made no provision for (T)H-3, forcing the State to seek an amendment in January of 1973. It was not until June of 1974, over strong opposition by responsible local officials such as the Mayor, the Department of Transportation Services and others, that the amendment was forthcoming. In addition to the City administration's opposition to the (T)H-3 amendment, public hearings on the matter showed public sentiment to be 8-1 against the project.

The OGP has been criticized severely since its inception and is now in the process of complete revision. It is interesting to note its change in policy. Latest drafts require Oahu's transportation needs be satisfied by mass transit and not highways.

² Assumptions made by the State do not even reflect present day traffic on Oahu. Two of the more outrageous assumptions were a figure of 1.2 persons per car and a diversion rate of 21.9% (percentage of people that would use mass transit as opposed to the car.) This is absurd for currently the average number of persons per car is 1.5 (study conducted by Hawaii Department of Transportation, July, 1976). Similarly, in cities like Honolulu where gateway situations exist (limited access routes to downtown area because of water, mountains, etc.) transit diversion rates of up to 79.4% are common. (Union City, New Jersey: Route 495)

It must also be pointed out that although (T)H-3 is an Interstate Defense Highway it is so in name only. The reason it was designated as such was to procure the higher rate of federal funds allowed for Interstate highways. (Such highways are 90% funded by the federal government.) As for defense needs, the fact that Oahu's present transportation facilities were able to meet the needs of the Vietnam era illustrates that no new facilities are required. There certainly can be no greater test of a system's capacity than during those years.

2. *Description of the Undertaking:* (T)H-3, if constructed, would add an additional six lanes to the already existing eight lanes of traffic now traversing the Koolau Mountain range. The highway originates at the Halawa Interchange, extending through Moanalua Valley and up to the proposed Halekou Interchange on the Windward side. It then proceeds to Kaneohe Marine Corps Air Station. The undertaking would require the boring of two tunnels, one of 0.4 miles running through Red Hill into Moanalua Valley, and the second, of 0.9 miles, through the Koolau Mountains from Moanalua Valley to the Windward side of the island.

More specifically, the highway would utilize the north branch of the narrow Moanalua Valley to enter the Koolau Mountain Range. (T)H-3 would have two three-lane roadways separated by a median, with each roadway 36 feet wide with a paved shoulder 10 feet wide on the right and a paved shoulder 4 feet wide on the left. The median strip would be a minimum of 36 feet in width, the exact amount determined by topography. The proposal includes the use of viaducts in portions of the valley.

To route the proposed (T)H-3 through the valley would necessitate the construction of an earth and rock berm 59 feet high as a water retention structure. The berm's purpose would be to delay the peak flows in Moanalua Stream, functioning only in times of unusual storms.

Total cost of the project is approximately \$300 million. Of those portions completed, all could be used with minimal expense.

The decision to use the Moanalua Valley corridor was an amendment based on the 1965 public hearings. The valley was selected for reasons familiar to this Court, i.e., no one lived in the valley who could object. *See Citizens v. Volpe*, 401 U.S. 402 (1971). However, the fact that the public favored Moanalua Valley is not in any way indicative of their acceptance of the project.³ It only meant they did not want the highway running through their backyards. Regarding the public dislike for (T)H-3,⁴ subsequent hearings and

³ One group the Petitioner has grossly misquoted is the Outdoor Circle, a Hawaiian environmental group. The Petitioner maintains Outdoor Circle initially suggested putting the highway through Moanalua Valley (*Pet. 10*). This statement is unequivocally false and obviously designed to influence the Court. In fact, the Outdoor Circle has strongly objected to (T)H-3. In a letter sent Admiral Wright, State Department of Transportation, Outdoor Circle clearly established their position on (T)H-3:

The Outdoor Circle is deeply concerned that previous statements of the organization have been taken out of context and historical perspective. Our position formulated over the years is not truly reflected in the Environmental Impact Statement for H-3 nor in statements made during these hearings by State officials.

As stated by the Circle in July 1971, we do not feel that it is in the best interests of our country to force the people of this State to build highways and ruin our natural beauty with soon to be outmoded freeways. Hawaii's unique status needs to be considered. What we need is a superior public transportation system now. *Letter dated August 29, 1973 from Outdoor Circle to Admiral Wright.*

⁴ This opposition includes the City administration who feels the only sensible way to meet 1990 needs is mass transit:

In 1970, Oahu's auto population numbered 285,000, and, based on present trends, this will increase to exceed 500,000 within the next 20 years. However, the trend the past three years has far outstripped those projections with five per cent per year increase. On that basis, there would be a 250 per cent increase over the 20 year period or 710,000 vehicles. There are only 1,200 miles of roads and streets on Oahu at the present time, and this will remain relatively constant for the foreseeable future based on present State and City planning; if the street system in Honolulu is congested now, what will it be like with double the present number of automobiles?

Add all of these together, and we come to the inevitable conclusion that the residents of Oahu cannot continue to rely on the automobile as the primary mode of transportation. We must reverse the trend by increasing the reliance of people on public mass transportation. We must have more efficient use of our present highways by using car pools, exclusive bus lanes, low-capital improvement facilities instead of building TH-3 that would encourage lower vehicle passenger occupancies and greater waste of our precious energy resources. *George Villegas, Director of Transportation Services, City and County of Honolulu, letter to ACHP, August 5, 1974.*

public polls clearly demonstrated how intense this dislike really was.⁵

3. *The Moanalua Valley:* Moanalua Valleys (Kamananui and Kamanaiki) comprise about 3,000 acres of land. Because of the extreme narrowness of the Kamananui valley floor, the 3.1 miles of (T)H-3 that will pass through it will physically occupy a major portion thereof. (See Map)

Kamananui, the Valley of the Great Power, contains Waolani, the valley of spirits which was, legend says, "the dwelling place of the gods." The forests of the valley retain a traditional natural state associated with the legends and the history of the area.

Moanalua was the property of the royal house of Oahu, the scene of battles and other exploits which are extolled in ancient Hawaiian chants, the Kahikilaulani and the Pele o Moanalua. After King Kamehameha conquered the island of Oahu in 1795, the valley was the home of his supporters and eventually passed in 1848 to his grandson, King Kamehameha V, then to Princess Ruth Keelikolani in 1872, and, upon her death, to her cousin, Princess Bernice Pauahi Bishop, who willed it in 1884 to her friend, Samuel Mills Damon.

The valley is currently in the ownership of the Trustees of the Damon Estate.

At the present time the Trustees do not allow vehicular access to the valley without proper authorization. This is primarily for safety due to the deteriorated condition of the jeep trail. When this road is improved, vehicular access will be permitted. Pedestrian access to the valley is unrestricted.

⁵ The Petitioner's Brief has grossly distorted public feelings on (T)H-3. In fact the residents of Honolulu are so against the highway they refer to it as the "Road to Ruin." This sentiment was expressed in the Legislative House Transportation Committee where testimony ran 3:1 against (T)H-3. Similarly, during the 1975 Legislature, opponents of the highway were able to muster the second largest rally ever held at the State Capitol. It was agonizing to see such efforts be totally ignored.

Regarding future plans for the valley, the Trustees have publicly announced their intention to develop the valley into a park and thereby preserve its archeological and historical sites. Although the Trustees are officially neutral on the (T)H-3 question, the provisions of the trust under which the Trustees must operate mandate their management of its assets for the highest return. Therefore, as Trustees, they can do nothing to stop the State from condemning the land for (T)H-3.

4. *Moanalua Gardens Foundation:* The Foundation was set up as a nonprofit corporation in 1970. Its major function is to preserve and develop the historical, cultural and natural resources of Moanalua Valley, and to encourage the use of these resources for appropriate educational and recreational purposes.

B. SECRETARY OF INTERIOR'S DETERMINATION THAT MOANALUA VALLEY IS ELIGIBLE AS AN HISTORIC SITE OF STATE/LOCAL IMPORTANCE.

On March 26, 1973, Moanalua Gardens Foundation submitted an application to the United States Secretary of Interior for nomination of Moanalua Valley to the National Register of Historic Places. In response to this request, the National Park Service called on Dr. Katherine Luomala, considered internationally, nationally and locally to be the leading expert on Polynesian oral history and folklore, to review the Foundation's application.⁶ Dr. Luomala concluded that the documents presented in support of the Foundation's application "are of a quality and content to convince me of the *national* value in

⁶ Previously the Damon Estate contracted with the Bishop Museum to conduct an historical survey of the Valley to supplement the archeological study being conducted for the State. The results of this survey appear in EIS, Vol. IV, Appendix A, p. 51. The conclusion reached by the Museum is that "Moanalua is rich in recorded history associated with the eventful lives of Oahu's and Hawaii's people.... Its future can provide an unspoiled setting for the telling and depicting the story of a Hawaiian Land in legend and history." *Id.* at 65.

preserving Moanalua Valley for the future".⁷ On the basis of this report, the Secretary's (Interior) Advisory Board found Moanalua Valley to be of national significance and recommended that it be declared eligible for designation as a National Historic Landmark. Subsequently the Board reassessed its evaluation that Moanalua Valley was of *national* significance, saying such a determination would require more time. This decision had no bearing on its belief that the area was of state and local significance. Therefore, the final recommendation to Interior was:

The Advisory Board strongly endorses the preservation of Moanalua Valley. Historical, cultural and natural values combined with the outstanding potential for an environmental study area endow Moanalua Valley with an importance that makes its preservation clearly in the public interest. The Board recommends that you make these views known to the Secretary of Transportation and the Governor of the State of Hawaii.

C. PROCEEDINGS BELOW.

In July of 1972, Plaintiffs filed suit in the United States District Court for the District of Hawaii and sought to enjoin construction of (T)H-3 because of Defendants':

1. Noncompliance with the requirements of the National Environmental Policy Act, 42 U.S.C. §4321-4347;

⁷ Report to Advisory Board on National Parks, Historic Sites, Buildings and Monuments dated May 31, 1973. The Board was created under the Historic Sites Act of 1935, 16 U.S.C. §463. Dr. Luomala's position is consistent with that of Dr. Edward Gavan Daws, professor of Hawaiian History at the University of Hawaii, hired as a consultant to prepare a portion of the EIS for (T)H-3. Dr. Daws concluded that "the materials recorded in the Damon notebooks (in support of the Foundation's application for Register status) are excellent examples of *surviving* relationships made by the Hawaiians between the Gods, man and nature.... [T]he point of survival is extremely important nowadays, since on Oahu 65% of the known historic sites have been lost, mainly to development.... [I]n my opinion no other place in the islands offers so much potential for putting so many people in touch with the Hawaiian view of the world in a setting so close to that which the Hawaiians themselves worked out their world view."

It is interesting to note that after incorporating the above sentiment into a draft copy of the EIS, Dr. Daws was fired because of an alleged conflict of interest. His work never appeared thereafter in the final EIS. It was to become Appendix (I) to Vol. IV.

2. Failure to hold adequate public hearings, 23 U.S.C. §128;
3. Failure to respond to local disapproval of (T)H-3, 23 U.S.C. §134;
4. Nonconformity of (T)H-3 with the Oahu General Plan (State cause of action and pendent jurisdiction granted);
5. Failure to prepare a §4(f) statement, 23 U.S.C. §138, 49 U.S.C. §1653(f);
6. Violation of safety standards relating to air quality, 23 U.S.C. §109(a) and (j).

Realizing they were obviously in violation of the law, Defendants stipulated to an injunction September 15, 1972. During the next 27 months considerable activity took place, i.e., design work was enjoined on October 18, 1972; the Preface to the EIS was ordered by the District Court to be circulated May 3, 1973; additional public hearings were ordered by the District Court on July 13, 1973; the Oahu General Plan was amended, June, 1974; a 4(f) statement was prepared for the Pali Golf Course, December 3, 1974 (required because the Pali course is a park that would be used by (T)H-3); and a State determination that Moanalua Valley is of *marginal significance*, prepared August of 1974. Therefore, when Defendants came into District Court on December 3, 1974, they assumed they had touched all the bases. The District Court agreed. (*App.* 64). However, Plaintiffs were convinced Defendants had not and filed an appeal to the Ninth Circuit Court of Appeals.

On March 8, 1976 the Ninth Circuit Court of Appeals reversed the District Court by finding Defendants had not complied with 23 U.S.C. §138. The Appellate Court recognized the applicability of §4(f) as this Court did in *Overton Park*. This Court must reaffirm that position by denying certiorari.

REASONS FOR DENYING THE WRIT

The matter before this Court is truly unique in that during the entire history of the National Register program the Secretary of

Interior has declared a site locally significant without the concurrence of local officials only once: Moanalua Valley. Therefore, for all practical purposes, a decision by this Court will affect only those for and against the building of (T)H-3. As a consequence of the uniqueness of this suit there is no conflict among the Circuits. Most importantly the relief sought by Respondents to Stop H-3 Association *et al* is very similar to a problem this Court realized under §4(f) in *Overton Park*,⁸ wherein local officials expected to rule objectively on the historicity of a property are also faced with the temptations federal funding brings. The decision reached by the Ninth is consistent with dicta from the *Overton* decision.

A. THE U. S. SECRETARY OF INTERIOR PROPERLY
DETERMINED MOANALUA VALLEY AS "ELIGIBLE"
FOR INCLUSION IN THE NATIONAL REGISTER.

Under the National Historic Preservation Act, 16 U.S.C. §470, *et seq.*, the Secretary of Interior is authorized to expand and maintain a National Register of Historic Places containing property determined to be significant in American history. The importance of the Register program is that it assures that federal, federally assisted and federally licensed undertakings affecting Register properties will include a §106 review between the responsible federal agency and the

⁸ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 412, 413 (1971).

But no such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another, there will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statute.

Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statute indicates that protection of parkland was to be given paramount importance....

President's Advisory Council on Historic Preservation.⁹ 16 U.S.C. §470(f), Executive Order 11593 implementing the Act and ACHP procedures, 36 CFR §800, *et seq.*, have expanded this consultation requirement to situations wherein the Secretary has determined that a property is "eligible" for inclusion in the Register.

The §106 process for (T)H-3 began with the petroglyph rock, Pohaku ka Luahine, a property listed on the National Register. Since the highway could have an effect on this property, the Federal Highways Administration (FHWA) was required to institute the §106 review. Accordingly FHWA made such a request November 5, 1973. Pursuant to this request, authorized representatives of the Advisory Council, FHWA and the Hawaii State Preservation Officer initiated the 106 review pursuant to Council procedures. [36 CFR §800.5].

An on-site inspection of the petroglyph rock was conducted including an inspection of Moanalua Valley, within which the rock was located. This was followed by a public information meeting.

On the basis of the information developed in consultation, the Advisory Council representative determined that the construction of the (T)H-3 would adversely affect Pohaku ka Luahine, a National Register property. It was also recognized that no boundaries had been established for the National Register property and there were allegations that the cultural significance of Pohaku ka Luahine extended to Moanalua Valley itself. Further, it was alleged that Moanalua Valley possessed historical and cultural significance of its own which would qualify it for the National Register.

On the basis of the information developed in the consultation, the Council's authorized representative determined that the question of the significance of Moanalua Valley of itself, not because of its

⁹ The Advisory Council was created under the National Historic Preservation Act and constitutes an independent agency of the Executive branch of the federal government. Its main function is to advise the President and Congress on matters involving historic preservation.

relationship with Pohaku ka Luahine, was of sufficient importance to require clarification. Therefore, the Advisory Council representative advised FHWA to request a determination of eligibility from the Secretary of the Interior concerning Moanalua Valley. When FHWA declined to make the request, the Advisory Council representative brought the matter to the attention of the Secretary of the Interior. [16 U.S.C. §470(k).]¹⁰ The Secretary of Interior made the factual determination that Moanalua Valley is "eligible" for inclusion in the National Register and first published notice of this May 8, 1974.¹¹ In making this determination, the Secretary found that:

Moanalua Valley possesses historical and cultural values of at least local dimensions and therefore could meet the less stringent criteria of the National Register for sites of local significance.¹²

Although this procedure was somewhat irregular, the disparity of opinion between the Secretary's Advisory Board and the State

¹⁰ The legitimacy of the ACHP seeking the Secretary's opinion is well established. The most recent instance is *Don't Tear It Down, Inc. v. GSA*, 6 ELR 20091 (DC DC, 1975). The facts show GSA attempting to construct a new building in Washington, D.C., which would require destruction of structures thought to have historical significance. When the ACHP advised GSA of the possible historical significance of the soon to be destroyed structures, GSA informed the Council that it had consulted with persons far more experienced than the Council who thought the structures were without historical importance. The Council, frustrated by such indifference, took it upon itself to consult Interior and request that a determination be made as to the properties eligible for inclusion in the National Register. After finding the property was of historical significance, the Secretary listed it on the National Register. As a result GSA was forced to comply with §106.

¹¹ This determination was made pursuant to 16 U.S.C. §470a(a)(1) and Executive Order 11593 §1(3).

The only measurable difference between a listed and eligible property is that the latter has not been nominated to the National Register by the appropriate officials of the State in which it is located. However, such a nomination is not required under the National Historic Preservation Act. Rather, it is the administrative custom of the Department of Interior.

¹² Letter, Secretary of Interior, Rogers Morton to Governor John Burns, May 13, 1974. There can be no question of the Secretary's position on this matter for it has appeared on a monthly basis since that date.

made it necessary.¹³ As a result of this determination, the Council's procedures required that the §106 review include both the petroglyph rock and Moanalua Valley. After further consultation, the parties reached agreement on measures to satisfactorily mitigate the adverse effects of (T)H-3 on the petroglyph rock, but they were unable to reach any agreement as to similar mitigation measures for the Valley. Therefore, at the joint request of FHWA and Advisory Council Chairman, the matter was scheduled for consideration at the next Council meeting. [36 CFR §800.6.]

The Advisory Council met on August 7-8, 1974, and, pursuant to its responsibilities under §106, Executive Order 11593 §1(3) and ACHP procedures, recommended that (T)H-3 not be constructed in or through Moanalua Valley in order that the Valley's importance as a cultural, archeological, and historical resource not be impaired.¹⁴ This determination was totally ignored by FHWA as evidenced by a letter dated September 19, 1974, from FHWA to ACHP. FHWA's determination to proceed with the undertaking in total indifference to the opinion of recognized experts is a policy strongly objected to both by this Court¹⁵ and other Circuits hearing this issue.¹⁶ The Council

¹³ ACHP procedures require that when the historical significance of a property whose eligibility for National Register status is questionable, an official opinion from the Secretary of Interior is required. 36 CFR §800.4(a)(2) (January 25, 1974).

Although ACHP procedures fail to explain when a property's eligibility is questionable, Proposed Rules by the Department of Interior are consistent with the procedures followed in (T)H-3.

A question on whether a property meets the National Register criteria for evaluation may occur when there is a difference of opinion on eligibility either between the agency and the State Historic Preservation Officer or the agency and the State Historic Preservation Officer on the one hand and private groups or citizens on the other. (Emphasis added). 41 Fed. Reg. 17689 (April 27, 1976).

¹⁴ In view of the Advisory Council's responsibility under the National Historic Preservation Act such a recommendation could easily be considered a de facto finding of historical significance.

¹⁵ *Warm Springs Task Force v. Gribble*, 6 ERC 1745 (1974) wherein Justice Douglas held: The Council on Environmental Quality, ultimately responsible for administration of the NEPA, and most familiar with its requirements for Environmental Impact State-

expressed its strong opposition to FHWA's disregard for its recommendation but nothing changed.¹⁷

B. U.S. SECRETARY OF INTERIOR HAS AUTHORITY TO DETERMINE THE LOCAL/STATE/NATIONAL HISTORICAL SIGNIFICANCE OF A PROPERTY UNDER NHPA.

The legislative history of the NHPA emphasizes the importance of Interior's part in the identification and preservation of sites of local, state and national significance. 16 U.S.C. §470a(a)(1) provides in part:

The Secretary of Interior is authorized to expand and maintain a national register of...sites...significant in American history...and culture...referred to as the National Register....

The Secretary has promulgated regulations which implement 16 U.S.C. §470a(a)(1). [39 Fed. Reg. 6402 *et seq.*, February 19,

¹⁵ Continued

ments has taken the unequivocal position that the statement in this case is deficient...That agency determination is entitled to great weight. *Id.* at 1748.

¹⁶ *Sierra Club v. Froehlke*, 5 ERC 1033 (S.D. Tex. 1973) wherein engineers failed to respond to the comments made by the President's Council of Environmental Quality who are statutory experts on environmental impacts. The Court held:

Congress did not intend that a federal agency consult with another agency "which has...special expertise with respect to any environmental impact involved" and then have its comments...ignored...With all due respect to the experts acquired by the Corps of Engineers to work in environmental sections their duties cannot include their substitution for the expertise of other federal agencies charged with primary duties relating to the environment. When a conflict arises between the Corps and an agency which is making an evaluation in its particular field of expertise, and when the Corps' evaluation is based upon factors of which the reviewing agency may take cognizance, then NEPA obligates the Corps [as NHPA obligates FHWA] in most instances to defer to that evaluation. Only upon the presentation of clear and convincing evidence that the reviewing agency was incorrect in its assessment should the Corps adopt another evaluation. Even so, this refusal to defer should not occur until after the reviewing agency has had an opportunity to review the Corps' claimed evidence, and possibly reverse or modify its original evaluation. *Id.* at 1072.

¹⁷ Since the Council is to the National Historic Preservation Act (NHPA) what the Council on Environmental Quality is to the National Environmental Policy Act, 16 U.S.C. §470(i), its comments should have been more favorably responded to.

1974.] Under those regulations, the Secretary, through the National Park Service, determines which of the sites nominated by the states for placement in the National Register as sites of local, state and national significance warrant such placement. Once a site is placed in the Register, or it appears that it ought to be placed in the Register, the Secretary has jurisdiction over the site. His responsibilities include the effectuation of Congressional policies which mandate its preservation (*see, e.g., 16 U.S.C. §470(c)*) and the maintenance of a program under which federal funds for its protection may be granted to the state. [*see, e.g., 16 U.S.C. §470(a), (b), and (c).*]

The legislative history of the Historic Preservation Act emphasizes the importance of the role of the Federal government, and particularly the Secretary of Interior, in the identification and preservation of sites of local and state, as well as national, significance. In commenting on 16 U.S.C. §470(c), which provides in part that:

...the present governmental and nongovernmental historic preservation programs and activities are inadequate...

the House Report, H.R. Rep. 1916, 89th Cong., 2d Sess. 7 (1966) states:

...the national historic preservation effort should continue to be, as it has been in the past, a function of the Department of the Interior and particularly of the National Park Service.¹⁸

The legislative history also makes it clear that an essential element in an effective historic preservation program is the accurate identification of historic sites of national, state and local significance. The Department of the Interior (and the Secretary) is given responsi-

¹⁸ This is consistent with Congress' desire to assign historic preservation responsibilities to Interior. Therefore from the Antiquities Act through the Archeology and Historic Preservation Act of 1974, 16 U.S.C. sec. 469a-1 *et seq.*, and including the Historic Sites Act of 1935, 16 U.S.C. sec. 461 *et seq.*; the National Historic Preservation Act of 1966, 16 U.S.C. sec. 470 *et seq.*; Executive Order No. 11593, May 13, 1971, 36 Red. Reg. 8921; and the Historic, Architectural and Archeological Preservation review responsibilities of the National Environmental Policy Act, 42 U.S.C. sec. 4321 *et seq.*, as implemented by the Council on Environmental Quality Guidelines, 41 C.F.R. Part 1500, Appendix II, Interior has been in charge.

bility for this function. The Senate Report, S. Rep. 1363, 89th Cong., 2d Sess. 6 (1966) states:

An essential first step in the preservation of significant historic properties is to identify and catalog these properties in a manner which would facilitate the taking of effective action to preserve them. §101(a)(1) [16 U.S.C. §470a(a)(1)] would permit the Department of the Interior to expand its national register program to include historic properties of national, state, regional or local significance...

Finally, the Secretary of the Interior has the authority to determine that sites are of local, state and/or national significance under Executive Order 11593, implementing the National Historic Preservation Act of 1966, 16 U.S.C. §470 *et seq.*, [see 16 U.S.C. §470d(b)]. It provides in part:

The Secretary of the Interior shall...advise the Federal agencies in the...identification...of historic properties.

A determination made by the Secretary pursuant to his authority under the Executive Order and the Act is given great weight. Even in those cases where local and state officials dispute a finding of significance by the Secretary, his finding alone will operate to invoke the protection of the Act. [36 C.F.R. §800.4(a) (2), 39 Fed. Reg. 6404, 6405, February 19, 1974.]

It should also be pointed out that the Secretary's determination was made in response to a legitimate request from the ACHP. The fact that the local review board (Hawaii Historic Places Review Board) disagreed in no way affects this determination.¹⁹ As explained by the ACHP:

The members wish to point out in particular the misconception stated in the letter of September 19, concerning the significance of

¹⁹ Respondents have always questioned the good faith of the HHPRB's determination regarding Moanalua Valley since it was made only two (2) days before ACHP consultations August 7-8, 1974. Rather, they view such determination as a transparent attempt to influence the Council.

Moanalua Valley. The Historic Sites Act of 1935 and the National Historic Preservation Act of 1966 give responsibility for determining values of history, architecture, and culture to the Secretary of the Interior. *Moanalua Valley has been declared eligible for the National Register of Historic Places by the Secretary of the Interior; consequently, its significance has been established by the highest authority, and it is entitled to the consideration given any historic property in accordance with the national policy expressed in the National Historic Preservation Act and Executive Order 11593 of May 13, 1975. The opinion of the State of Hawaii Historic Review Board in no way affects this determination.* (Emphasis added.)²⁰

C. THE U.S. SECRETARY OF INTERIOR IS AN APPROPRIATE OFFICIAL TO DETERMINE A PROPERTY'S STATE/LOCAL SIGNIFICANCE FOR PURPOSES OF §4(F).

Petitioner argues that the Secretary of Interior is not an appropriate official to render §4(f) findings for sites of state/local significance (Pet. 19). This argument ignores the wording of the Act itself which allows "federal, state or local officials having jurisdiction over property to invoke §4(f)." The use of the plural word "officials" illustrates the weakness of Petitioner's argument. (See, *App. 12 n. 15*). This interpretation also ignores the statement by Senator Cooper during a floor debate where he explains:

²⁰ Letter from ACHP to FHWA dated November 25, 1974. Subsequent correspondence of the National Park Service confirmed that this was an official determination of Moanalua Valley's "eligibility":

...concerning Moanalua Valley in Oahu, Hawaii, a property determined eligible for inclusion in the National Register of Historic Places by the Secretary of the Interior pursuant to Executive Order 11593. Notice of the official determination that Moanalua Valley is eligible for inclusion in the National Register first appeared in March 29, 1974, letters from Dr. A.R. Mortensen, Director, Office of Archeology and Historic Preservation, to Mr. Robert F. Crecco, the Department of Transportation Federal Representative for Executive Order 11593, and Ms. Ann Webster Smith, former Director, Office of Compliance, Advisory Council on Historic Preservation. Notice of the determination has also been published in the monthly supplements of the "Federal Register" beginning on Tuesday, May 7, 1974. Letter from Murtagh of the National Register to Schweigert, Co-counsel Stop H-3, dated June 23, 1975.

...if any local body or state body or federal body having jurisdiction declares that any of these areas are of local state or national significance then the Secretary cannot approve any program or project which would invade or encroach upon these areas....²¹

The statute obviously allows for federal officials other than Transportation to determine the state/local significance of a site. The issue then becomes whether Secretary of Interior is such an official.

The Ninth Circuit ruled that he is and supports this by the statement of Professor Oscar Gray, a leading authority and a person who actually worked with §4(f).²²

Historic sites present special problems. Unlike the other protected lands they need not be publicly owned. When they are not publicly owned, no presumption of a determination of significance can arise from the fact of public maintenance since normally only publicly owned property is publicly maintained. It is, on the other hand, customary for historic sites to be designated as such by someone such as a local or state landmarks commission, or by the United States Department of the Interior. Any such designation is presumably equivalent to a determination of significance for purposes of section 4(f).

The determination may be made by any of the local, state or federal officials who can claim to have "jurisdiction thereof." For these purposes "jurisdiction" may refer to more than merely political authority, although governing bodies having general jurisdiction over the land in question would be able to trigger the application of the last sentence of section 4(f) by declaring their determination of the significance of land which they wish to protect. *An agency which is authorized to decide that properties have historic importance may be regarded as having "jurisdiction" over determinations of historic significance. Some properties, for instance, are listed by the Secretary of Interior in the National Register of Historic Places. It is inconceiv-*

²¹ 114 Cong. Rec. 24032 (July 29, 1968).

²² Professor Gray was formerly the Chief of the Environmental Office in the Department of Transportation administering §4(f).

able that a National Register property could be regarded as ineligible for protection under section 4(f), regardless of whether it was considered "significant" by the local or state governing bodies having political jurisdiction over the property. A similar triggering function may inhere in a local or state historic society, if it has official status to designate landmarks. It might also be found in a state parks or recreation commissioner with respect to local parks which he has the authority to classify for state purposes, although they may not be under his administrative control. (Emphasis added.) (App. 13 n. 15)²³

By assuming otherwise, Petitioner is giving local officials a de facto veto power over determinations by Interior. This position seriously weakens the effectiveness of not only 4(f) but other equally important federal legislation designed to preserve our nation's historic sites.²⁴

It also ignores decisions by other courts who have consistently held that a local preference cannot in any way work to defeat the underlying Congressional policy behind 4(f).²⁵

²³ Respondents must also point out the tremendous inconsistency in Petitioner's argument in drawing a distinction between determinations of historicity. By acquiescing to §106 they recognize Interior's ability to determine sites of local/state importance. In view of the Secretary's degree of expertise and the strong national policy to preserve *all* historic sites, how can Petitioner legitimately question the Secretary's authority for purposes of §4(f)? The Ninth Circuit properly determined this distinction exalts form over substance. (App. 13).

²⁴ Other legislation regarding historic preservation includes:

National Historic Preservation Act, 16 U.S.C. §470b wherein the declared policy is that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.

National Environmental Policy Act, 42 U.S.C. §4331(b) wherein Congress "authorizes and directs that to the fullest extent possible...the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, e.g., to preserve important historic, cultural and natural aspects of our nation's heritage."

Parklands Statute, 23 U.S.C. §138 wherein "It is hereby declared to be a national policy that special effort should be made to preserve...historic sites."

²⁵ Respondents are troubled with the argument raised by Petitioner that the form of review exercised by the Secretary of Interior is an example of an improper interference in State

Clearly, Congress did not intend to leave the decision whether Federal funds would be used to build highways through parks of local significance up to the city councils across the nation. If there was any doubt about this question before [*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)] there most assuredly is no longer any doubt... (From that case) we must conclude... that the Court attached little, if any, significance to local officials' preference to use Overton Park for highway right-of-way. *Named Individual Members of San Antonio Con. Soc. v. Texas Highway Dept.*, 446 F. 2d 1013, 1026-1027 (5th Cir., 1971). *Accord, Penn. Environmental Council, Inc. v. Bartlett*, 454 F. 2d 613, 622 (3rd Cir., 1971); *EDF v. Brinegar*, _____ F. Supp. _____, 6 ERC 1577, 1594 (E.D. Pa. 1974).

One of the more unfortunate consequences of Petitioner's argument is that it necessitates the loss of the one official whose statutory responsibility is evaluating historic sites of local, state and federal significance. This loss is compensated by substitution of an official whose responsibility is not to conduct such evaluations but rather to move people from one city to another in the least amount of time and with the greatest degree of safety. The influence of such a responsibility is tremendous:

...there exists a natural, in fact, healthy bias, on the part of most action-oriented Federal agencies in favor of doing what they were established to do; be it build dams, bridges, navigation or irrigation facilities, etc. Unfortunately, much of what many of the action-oriented agencies do is done at the expense of the natural environment. In light of such realities, it would appear to be an exercise in futility to expect such agencies to balance their statutory functions with the national policy of environmental enhancement and do so within the

²⁵ Continued

matters. Since (T)H-3 is funded under the Federal-Aid Highway program, then by definition there is going to be federal monitoring of the project, a fact Petitioner ignores. Additionally, the Court must realize that in the matter of (T)H-3 Interior was not saying §4(f) applied, but rather *Moanalua Valley is a historic site*. This determination cannot be reversed by Transportation who must then recognize the historical significance of the property involved and apply §4(f). [36 C.F.R. §800.4(a)(2)]

spirit of the Act. Hugh J. Yarrington, *Judicial Review of Substantive Agency Deficiencies: The Second Generation of Cases Under the National Environmental Policy Act* (1974)

Certainly the *special effort* called for under 4(f) provides more protection than Petitioner allows.

Finally, Petitioner's argument is unsupportable from a reading of FHWA regulations themselves, 23 C.F.R. §771.19, which automatically extend 4(f) protection to properties listed or eligible for inclusion in the National Register.

If the project will use land from an historic *property* that is included in or eligible for inclusion into the National Register the 4(f) statement should provide evidence that the provisions of 36 C.F.R. Part 800 have been satisfied. (Emphasis added.) [23 C.F.R. §771.19(b)]²⁶

A logical interpretation of this is that a National Register property automatically receives 4(f) protection. The regulations then carefully distinguish historic *properties* from historic *sites*, stating that:

If the project will use land from an historic *site* not eligible for inclusion in the National Register, the §4(f) statement should provide evidence that the official having jurisdiction thereof has determined it to be of national, state or local significance. [23 C.F.R. §771.19(b)]

Determinations regarding an *historic site* are reviewable by FHWA. [23 C.F.R. §771.19(c)]²⁷

Professor Gray explains this distinction in a similar way:

Unlike section 106 of the National Historic Preservation Act of 1966, which provides for protection of properties on the National

²⁶ Petitioner argues that the issue is not an interpretation of the NHPA but rather §4(f). (*Pet. 14 n.9*) In view of this language this argument must be questioned.

²⁷ It was on this portion of the regulations the dissenting Justice Wallace focused his attention in determining the Secretary of Interior acted improperly. (*App. 29*). The Justice erred by not including 23 C.F.R. §771.19(a) in his assessment.

Register of Historic Places, section 2(b)(2) of the DOT Act applies to any "historic sites," and section 4(f) to any "historic site of national, State or local significance" as determined by either federal, state or local officials having authority to make such determinations. *Therefore, a National Register site is automatically entitled to protection under section 106 of the National Historic Preservation Act.* A non-National Register property, if determined to be of significance by other appropriate authority such as an official state or local landmark commission, also qualifies for protection under the DOT Act even if it is not entitled to protection under sections 2(b)(2) and 4(f) of the DOT Act as well as under section 106. (Emphasis added.)²⁹

D. SECTION 4(F) APPLIES TO THE PETROGLYPH ROCK, POHAKU KA LUAHINE.

The petroglyph rock, Pohaku ka Luahine, was placed on the National Register July 26, 1973. It is, therefore, a significant historic site within the meaning of §4(f). [C.F.R. §771.19 (July 21, 1976)]. Petitioner attempts to confuse the issue by emphasizing the physical attributes of the property. He concludes that such qualities cannot meet the standard of definition of what constitutes a §4(f) "site." Petitioner errs on this point for two reasons: First, as pointed out in the preceding section, when dealing with historic properties listed as such on the National Register, FHWA regulations automatically apply 4(f) protection regardless of the physical qualities of the property.

Second, the petroglyph rock is more than the sum of its parts for the rock retains its *historic significance* (to be distinguished from its archeological significance) only so long as it remains where it is in Moanalua Valley. It derives nearly all of its importance from the setting in which it presently rests. It is the heart of Moanalua Valley. Today the daily field trips that go into Moanalua Valley stop at the

²⁹ Gray, Oscar, *The Response of Federal Legislation To Historic Preservation*, 36 Law & Contemp. Prob. 314, 318 (1972).

rock and learn, with reference to the drawings on the rock, the story of Moanalua and the events associated with it.²⁹ If the petroglyph rock is moved it will lose most of its historical significance.³⁰

Therefore, the petroglyph rock is much more than an inanimate object; it is a site within the meaning of §4(f).

Finally the Petitioner raises a point Respondents do not believe is an issue concerning (T)H-3's use of the petroglyph rock. (*Pet.* 25.) Therefore, the Respondents do not consider it a proper request for this Court's review. [*Tyrell v. District of Columbia*, 243 U.S. 1 (1917).]

However, in fairness to the Court, Respondents will respond to the error in Petitioner's argument.

First, (T)H-3 will be approximately 100 feet from the petroglyph rock. (Petitioner assumes a distance of 200 feet.)

Second, the Advisory Council concluded that "...implementation of the mitigation measures proposed by FHWA for incorporation into the Memorandum of Agreement would not satisfactorily mitigate the adverse effects on Pohaku ka Luahine." (Emphasis added.)

Third, in situations like (T)H-3 where there is ambiguity as to the "use" of the property, the first sentence of §4(f) requiring "...special effort...to preserve...historic sites," reinforces the need to apply §4(f). Since this policy is not hortatory it must at least shift the burden of persuasion to the Secretary of Transportation.³¹

²⁹ See, EIS App. A 199-207.

³⁰ See, 36 C.F.R. §800.10(b).

³¹ *Pennsylvania Environmental Council v. Bartlett*, 454 F.2d. 613 (3rd. Cir., 1971).

CONCLUSION

For the foregoing reasons, a writ of certiorari must not be granted.

Respectfully submitted,
BOYCE R. BROWN, JR.
*Attorney for Respondents**

*Appellant's attorney wishes to acknowledge the invaluable time and assistance donated by John F. Schweigert, Esq. of Honolulu, Hawaii in the preparation of this Appellate brief.